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Children's Wellbeing and Children's Rights in Tension?

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Abstract

Children's wellbeing has moved from an academic field of interest to a policy and practice framework, internationally and in many countries. Children's wellbeing tends to be twinned casually with children's rights but recent Scottish legislation – the Children and Young People (Scotland) Act 2014 – has put children's rights and children's wellbeing in tension. This provides an opportunity to consider the concepts critically. The article scrutinises parliamentary debates and accompanying submissions, to reveal that children's rights arguments failed due to political concerns about litigation and a lack of evidence that children's rights improved children's lives. Children's wellbeing arguments were more successful, as children's wellbeing continues the familiar trajectory of a needs-based approach. It has additional benefits of maximising outcomes, emphasising early intervention and prevention, and statistical development. It also risks being apolitical and professionally-driven, with no minimum standards and limited recourse for children's and their families' rights and complaints. These findings raise broader questions about how to argue for children's rights in national and global contexts where children's wellbeing has ever-

increasing prominence, fuelled by calls for evidence-based policy and accountability via outcomes.

Key words: children's rights; children's wellbeing; outcomes

Introduction

In 2011, there was a moment when it looked like Scotland would 'trump' the rest of the United Kingdom (UK) jurisdictions, in taking forward children's rights. Inspired by the Welsh Children's Rights Scheme, the Scottish Government (2011) issued a consultation paper titled *Consultation on the Rights of Children and Young People Bill*. The paper proposed new duties on Scottish Ministers, in a dedicated Children's Rights Bill.

But no bill was forthcoming. Instead, the Government proposed a consolidated bill, one that would bring together children's rights with proposals for children's services. As the Government (2012) said, this would give the children's rights principles greater impact – to "make rights real" for children. This rhetoric is part of the consistent message that the current Scottish Government puts forward for children's policy. The Minister for Children and Young People, for examples, writes in a children's rights update:

My Ministerial colleagues and I have big ambitions for all our children and young people. We are committed to making Scotland the best place in the world to grow up, no less. Over the last four and half years we have taken a number of steps to make this ambition a reality and the UNCRC has played a central role in shaping our work.

At the heart of this work is a focus on prevention and early intervention. Through our Getting it right for every child approach we are strengthening how families, communities and professionals support children, placing them at the centre of services, involving them in decisions and providing them with the support that they need at the time that they need it. In short, it is about making rights 'real'. (Aileen Campbell, Minister for Children & Young People, 2013a: 3)

Children's rights has never before had such front-line, rhetorical prominence in Scottish policy. It forms part of the Scottish Government's aspiration to make Scotland "the best place in the world to grow up in". The Scottish Government is currently formed by the Scottish Nationalist Party and their messages about children and their future in an independent Scotland figured prominently in the (unsuccessful) independence referendum in autumn 2014. Children's rights and children's wellbeing, along with early years' provision and intervention, are key planks of both on-going government policy and future trajectories for Scotland as a nation.

But neither the promises of children's rights nor Scottish independence were realised by the end of 2014. An extensive bill was introduced to the Scottish Parliament in 2013, called the Children and Young People (Scotland) Bill. Part I was titled Children's Rights and placed new duties on Scottish Ministers and public authorities. Parts 3 to 5 of the Bill entrenched the newest attempt to provide integrated services in Scotland, Getting it Right for Every Child (GIRFEC). GIRFEC is organised around children's wellbeing, with eight wellbeing indicators used for GIRFEC assessments. Services have new duties to plan for children's wellbeing, both for individual children and for children collectively.

As the Bill progressed through Parliament, Part 1 and Parts 3 to 5 stirred up certain controversies. In the end, the Scottish Government's proposals prevailed but the ensuing discussions illuminate understandings of and debates over children's rights and children's wellbeing, and relationships between the two concepts. These raise broader questions about how to argue for children's rights in national and global contexts where children's wellbeing has ever-increasing prominence, fuelled by calls for evidence-based policy and accountability via outcomes.

This article begins by briefly outlining the relevant policy context, particularly of the Children and Young People (Scotland) Act 2014. It then draws on a comprehensive review of the legislative debates and submitted evidence, to consider the respective arguments for children's rights and children's wellbeing. First, the article considers the arguments for and against stronger incorporation of children's rights within domestic law. The article continues with the controversies over children's wellbeing in Parliament, which began with concerns about definition and then focused on thresholds for state intervention in parents' rights. Finally, the article reflects on the relative strength, advantages and disadvantages of children's wellbeing and children's rights as policy and practice frameworks.

[Leading up to the Bill and the Act itself](#)

Like many jurisdictions, the United Nations Convention on the Rights of the Child (UNCRC) (1989) gave an increased policy focus in Scotland, on children's rights. The UK ratified the UNCRC in 1991; as a devolved nation, Scotland cannot be a State Party itself but under the devolution settlement it can observe and implement international obligations (Scotland Act

1998, Schedule 5, Section 7(2)(a)). While international law requires the UK to comply with the UNCRC, children's rights under the UNCRC are not directly actionable in courts. To date, children's rights have been incorporated into domestic law in a piecemeal fashion, largely through insertions into particular pieces of legislation (see Tisdall 2014).

An opportunity to take a more holistic legal approach came with the Scottish Government's interest in the Welsh Children's Rights Scheme (The Rights of Children and Young Persons (Wales) Measure 2011). The Welsh Measure requires its Ministers to give "due regard" to the substantive rights and obligations within the UNCRC and its optional protocols. These duties are supported by consultation and publication requirements, as well as training for civil servants on children's rights. The Scottish Parliament has greater devolved powers than the Welsh Assembly: Scotland could go further than Wales and become an UK – and perhaps an international -- leader on children's rights.

The resulting consultation paper, *Consultation on Rights of Children and Young People Bill* (Scottish Government 2011), proposed a duty on Scottish Ministers to take "appropriate steps" to further the rights set out in the UNCRC. Organisations and individuals supporting children's rights gave enthusiastic support in principle to the consultation paper – although they wanted the duty to be strengthened and extended to "public authorities", including local government and health boards and trusts who actually provide services for children and their families. However, some from the legal profession questioned whether the duties would be a weaker version of existing international obligations (Scottish Government 2012). The Scottish Government responded with a promise of a larger bill in due course, that would bring together an increased commitment to children's rights with other legislative plans for children's services.

In 2013, the Children and Young People (Scotland) Bill was introduced into the Scottish Parliament. Heralded by the Scottish Government as “landmark” legislation, it contained 80 sections when introduced and grew to 103 by its completion. Part I covers a range of issues in regards to children’s rights (see below). Other parts of the Act add to the powers of Scotland’s Commissioner for Children & Young People, alter children’s services planning, place aspects of GIRFEC on a statutory footing, and extend early years provision. Even further, the legislation seeks to improve outcomes for looked after children through introducing corporate parenting responsibilities on certain public authorities and extending support post-16; it has detailed provisions to ‘clean up’ other legislation on issues such as kinship care and school closures.

As discussed in more detail in Tisdall and Davis (2015), the Children and Young People (Scotland) Bill epitomises ongoing policy trends in Scotland: promoting children’s rights; service accountability through outcomes; early intervention and prevention, and particularly investment in early childhood. The growing rhetoric of children’s rights has already been discussed above. Outcomes were given particular policy importance, when the Scottish Government established a new relationship with local government in 2007. Rather than specified funding and set targets, the 32 local authorities would be accountable through ‘single outcome’ agreements. This fit with children’s services, which was also developing an outcomes-based approach with wellbeing indicators: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included (SHANARRI). These indicators are central to GIRFEC, which overall seeks to address past problems in children’s services, such as lack of service co-ordination and crisis-driven responses (Stradling & Alexander 2012). GIRFEC begins with universal services, with all children having a ‘Named Person’ who provides a

potential link into support, information and services. GIRFEC aims to ensure children and their families “get the help they need when they need it” (Scottish Government 2008: 10). Services should be what children and their families really need, rather than merely what is available. While GIRFEC was heralded as successful in its pilot development (particularly in the Highlands local authority area), the Scottish Government saw its roll-out as too partial and too slow across Scotland. It thus proposed to place GIRFEC on a statutory footing. GIRFEC fits easily within a broader public service reform strategy (Christie Commission 2011), which emphasises early stage/age intervention and prevention. Investing in the early years of childhood – and indeed, in antenatal care before children are born – is a key preventive policy.

Thus, the Children and Young People (Scotland) Act epitomises key policy trends in Scottish policy generally and children's policy in particular. As introduced by the Minister for Children and Young People:

With the bill, we have set out our ambition to make Scotland the best place in the world to grow up in. I think that we all share that ambition. The bill advances the ambition by drawing on well-established policies and strategies. It takes forward our long-standing recognition that we need to make a bigger impact in our children's early years, not least through early learning and childcare. It lifts to a new level Scotland's unique and internationally lauded approach to helping children and young people through getting it right for every child ... the bill gives our natural and deeply embedded respect for the rights of children a statutory grounding in a way that fits

Scotland's traditions and looks to our future aspirations. (Aileen Campbell, Education and Culture Committee (ECC) 8.10.13, 2944)

Incorporating children's rights?

Part 1 of the legislation introduces new obligations on Scottish Ministers in regards to children's rights. Section 1(1) places duties on Scottish Ministers to:

- a) keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements; and
- b) if they consider it appropriate to do so, take any of the steps identified by that consideration.

Scottish Ministers must prepare reports every 3 years, on measures taken and future plans.

These will be laid before the Scottish Parliament and published. Public authorities – specified in schedule 1 of the legislation, including local authorities, health boards and trusts who are key commissioners and providers of children's services – will also prepare a report after each three year period, on "what steps it has taken in that [3 year] period to secure better or further effect within its areas of responsibility of the UNCRC requirements"

(S.2(1)). Scottish Ministers have new duties to promote public awareness and understanding of the rights of children and young people (S.1(3)). Part 1 thus provides a framework of duties on public bodies, which provide transparency and accountability, and new reflective and promotional duties on Scottish Ministers.

The evidence, amendments and debates on these provisions demonstrate very familiar arguments for and against children's rights and introduce less familiar ones. First, from early on, it was argued that the UNCRC may be applicable to some countries but not wholesale to Scotland nor to the particularities of the Scottish legal system. Professor Kenneth Norrie, a leading legal expert on Scottish domestic law, characterised the UNCRC as "bad policy, bad law and bad practice", in his written and oral evidence to the Education and Culture Committee (ECC) (see ECC 3.9.13, 2682 and Norrie 2013). He then explained to the Committee that the "UN Convention was not drafted or worded to create directly enforceable legal rights in the domestic legal system" (ECC 3.9.13, 2682) and that it was intended as an aspirational document only. Such views were countered by other evidence provided to the Committee. For example, UNICEF UK (2013a) reminded the Committee of evidence from other countries about UNCRC incorporation (Lundy et al. 2012) and Professor Elaine Sutherland wrote in with supplementary evidence, refuting Professor Norrie's views. However, it was Professor Norrie's comments that were repeated throughout subsequent debates.

Politicians' concerns about greater UNCRC incorporation were two-fold. One was the incorporation of economic, social and cultural rights directly into domestic law. The ECC Convenor, Stewart Maxwell MSP, ridiculed incorporating the right to play (Article 31 of the UNCRC):

Are you really saying that if we incorporate the UNCRC in domestic legislation and there is then a challenge, with somebody saying that their rights were somehow breached because they were forbidden to play, or their play was stopped, it would be a matter for the courts to decide? (ECC 1.10.13, 2889)

These were decisions that should not be made in law, and particularly not by courts, but by social policy and the democratic process (Professor Kenneth Norrie in ECC 3.9.13, 2682). Following from this, two, litigation must be avoided. Children and those supporting them should *not* have recourse to the courts for their rights. For example, a Scottish Government civil servant gave evidence to the ECC: “We certainly do not want to end up in a situation in which the courts are considered the go-to forum for addressing the range of issues that impact on children in Scotland” (25.6.13, 2648). In disagreeing with amendments to strengthen the Ministerial duties, the Minister for Children and Young People mentioned three times – in one debate alone -- the wish to avoid litigation and court interpretation (ECC 17.12.13). Yet, the justiciability of rights under the Human Rights Act 1998 is accepted by the Scottish Government, even though there is a history of litigation that has gone against the Government and Parliament. It seems that human rights – for adults? – can be justiciable in courts but not children’s human rights more specifically. Children’s rights might be promoted – which remains the stated intention of the Government (e.g. ECC 25.6.13, 2643) – but children should not have legal recourse if their rights were not met. Instead, children’s rights would be better furthered by cultural change in attitudes and thus adults’ individual and services’ collective practice (e.g. ECC 17.12.13). The Scottish Government recognised that more needs to be done, while the Convention of Scottish Local Authorities (COSLA, 2013) asserted that local authorities were already far ahead in addressing children’s rights. Either way, further or stronger legal duties were unnecessary.

Second, debates touched upon familiar concerns about children’s rights having negative impact on others’ rights. Indeed, the initial 2011 consultation had written about a potential conflict between parents’ rights under the European Convention on Human Rights (ECHR)

and children's rights under the UNCRC. Similar views were also voiced in Parliament. Liz Smith MSP, for example, stated: "If we extend the rights of children ... we have to be clear about the implications for and knock-on effects on other rights" (ECC 25.6.13, 2645). However, this was *not* a regular concern, when debating the Part 1 sections, and only became live again in considering the information-sharing provisions later on the Bill – discussed below.

Third, the mantra "make rights real for children" was taken up by several politicians, with a line of questioning about what practical effect these or stronger duties would have – and for evidence of such practical effects. This line of questioning may well have originated from the Scottish Government's evidence. When asked about Government considerations of greater incorporation, in the first evidence session, a civil servant replied:

"Very little evidence has been shared with ministers that sets out the benefits of taking that approach, and the limited evidence that we have seen suggests that benefits lie primarily in relation to improved culture within services and increased awareness of children's rights." (ECC 25.6.13, 2644)

Examples of current gaps and practical impacts were provided in oral evidence and in written evidence subsequently. The Scottish Commissioner for Children & Young People gave examples such as children's rights not being considered in planning applications and children's views not being embedded across legislation (ECC 1.10.13, 2887). UNICEF UK (2013b) submitted evidence from its cross-country report. John Stevenson, from the public sector trade union Unison, said:

“Certainly, the sense of our members is that children’s rights, especially those of younger children whose welfare has been severely affected in one way or another, are not as up top as they were maybe five, six or seven years ago.” (ECC 3.9.13, 2687)

Children and young people had been consulted before and for the Bill, by Government, and the ECC welcomed such consultation in principle (see ECC Stage 1 Report, 2013). But children and young people’s support for increased prominence of children’s rights was not mentioned in these debates, despite submissions in written evidence (Children’s Parliament 2013). Thus experiential evidence from professionals, children and young people was unpersuasive, here, as was the listing of particular case study examples. The ECC (Stage 1 Report, 2013) concluded that it was not persuaded of the arguments for full UNCRC incorporation into Scottish law. No clarity was given on *what* evidence would be persuasive and no commitment was made to funding research that might provide some answers.

Legal advice, in contrast, was valued highly – but it was seen as confusing and inconclusive. Professor Kenneth Norrie’s evidence was referred to frequently throughout the debates, to justify not going further in terms of UNCRC incorporation (e.g. ECC 17.12.13, Scottish Parliament (SP) 19.2.14). Mention was made of other legal evidence, such as the views of Professor Elaine Sutherland and UNICEF UK’s legal opinion. But certain MSPs spoke of being unable to resolve these different legal opinions as if this knowledge and expertise were not something they could challenge nor critically analyse themselves (SP 21.11.13, 24803 and 19.2.14, 27748). Legal advice, thus, was held in high esteem but it was not something certain politicians could fully understand and thus come to firm conclusions about. It was also not something that the politicians decided they wanted to invest in: as the Bill

proceeded, attempts were made to gain an ECC and then a Government commitment for an inquiry or Commission that could thoroughly research legally and otherwise the ramifications of UNCRC incorporation into Scottish law. This was not accepted by either the ECC or Government.

The moral assertion of children's human rights was unsuccessful. Jean Urquart MSP tried to make such arguments, in the last stage of the Bill:

"I hear what the committee has said about incorporating children's rights, but why do we need evidence to accept that children have rights that should be upheld and promoted in law in the same way that adults do? The same arguments were not made when the case was made for the adoption of the European convention on human rights, or for extending the Human Rights Act 1998 to apply to devolved matters during the passage of the Scotland Act 1998. If we did not require evidence to apply human rights to our domestic law, why do we need evidence for children to have rights in law?" (SP 19.2.14, 27741)

Her argument was not directly addressed in the ensuing debate. Instead, the familiar counterpoints concerns were repeated: that is, a desire to avoid litigation, there was limited evidence of impact, and professionals' improvements in service provision and culture would "make rights real" for children.

The politicians and Government were thus unpersuaded by experiential evidence, were somewhat confused but impressed by differing legal advice, yet felt no responsibility to commission any systematic and robust research evidence nor in-depth legal exploration to

inform future discussions. They did not find arguments for recognising children's human rights, in principle, persuasive in light of fears about litigation.

Overall, then, the promise of the 2011 consultation was not met in the final version of the Act. The children's rights framework did not end up framing the 2014 Act. The duties on Ministers to give effect to the UNCRC remain weak and are not extended to the providers of services, the public authorities. According to some of these providers, they are already sufficiently implementing children's rights; while progress is welcomed, evidence from children, young people, researchers and others does not find that children's rights are consistently recognised in practice (Elsley et al. 2013, Together 2014).

Children's wellbeing

This lack of success contrasts with the provisions for children's wellbeing. The oral evidence given by Bill Alexander, a local authority manager who has been deeply involved with developing GIRFEC in Highland Council, was given high status through the legislative proceedings (e.g. SP 19.2.14, 27792, 27794). Parliamentarians were further reassured by the general acceptance of GIRFEC, both by representatives of non-governmental organisations and statutory services. While some research has been undertaken on the GIRFEC pilots (e.g. Stradling et al. 2009) and available statistics show diminishing referrals to 'higher end' services and procedures, this evidence was seldom mentioned. The personal reassurances of key figures within children's services were sufficient to persuade Parliament, with the Scottish Government also fully behind the proposed provisions.

Under the legislation, local authorities and health boards will have substantial duties to plan for and provide services that "better safeguards, supports and promotes the wellbeing of

children” in their area (S.9(2)(a)(i)). They must prepare a plan every 3 years, keep it under review and implement it “so far as reasonably practicable” (S.12(1)). These Part 3 duties are thus much stronger duties than their reporting under Part 1, where a local authority or health board can report that they have done nothing beyond their domestic responsibilities, to further effect the UNCRC – and they will have met the legal requirement in Part 1 of the Act. No effort was made in the legislation to rationalise these planning requirements, although it is now happening through guidance to ensure a co-ordinated approach.

The wellbeing duties follow a trend that stretches at least back to 1968 in Scotland, where there was a “general welfare duty” on local authorities to promote social welfare (Social Work (Scotland) Act 1968, S.12). This was replaced, for children, by local authorities’ duty to provide for “children in need” in the Children (Scotland) Act 1995 and new requirements for children’s services planning. “Children in need” was little known and even less appreciated in Scotland (see Tisdall & Plows 2007) and the 2014 Act amends the “children in need” category so that local authorities should exercise their functions so as “to safeguard, support and promote their [children’s] wellbeing” (Children (Scotland) Act 1995, S.23A(2)). Thus, children’s wellbeing, and the accompanying efforts to implement it through service planning, have a tradition in Scottish policy.

The Parliamentary discussions show some attention to *how* and *in what ways* children’s wellbeing differs from welfare. At first, a civil servant told the Education and Culture Committee:

“... I do not think that in legal terms that there is that much difference between welfare and wellbeing. What we are proposing in the bill is a definition of wellbeing. Welfare is not defined in the existing legislation.” (ECC 25.6.13, 2653)

Later legal evidence disputed the concepts' similarities, with welfare seen as a higher threshold for state intervention than wellbeing. This became an accepted distinction, with the Scottish Government arguing strongly that children's wellbeing fits well with its emphasis on early intervention and prevention (e.g. ECC 7.1.14, 3237). While legal contributions argued that introducing wellbeing would be confusing given a “well developed case law on welfare and best interests” (Faculty of Advocates 2013, 3), the Scottish Government and others argued that the legislation gives adequate definition to wellbeing. They made reference to the 8 SHANARRI indicators that underpin GIRFEC assessment. But these do not provide a *definition* of wellbeing but how it will be *assessed* (S. 96(2)). No definition of children's wellbeing itself is given in the legislation.

Reassurances are given frequently that the SHANARRI indicators are well used and understood:

“There is a danger that, for those who are coming to it fresh, “wellbeing” sounds a rather fluffy, ill-defined term. In fact, the definitions of wellbeing are very clearly established around what are called the SHANARRI ... indicators. The tools that have been developed have been widely accepted across agencies. Having a common language is a real benefit.” (Martin Crewe, Barnardo's Scotland, ECC 17.9.13, 2799).

This explanation underlines that the discussions are largely about *agencies'* or *professionals'* understandings and not parents', other carers' or children's understandings. Descriptions of

GIRFEC are professionally driven and decided, as exemplified by Mike Burns (Association of Directors of Social Work): "... professionals need to work together to be clear about how a child's needs will be best served by the local resources that are at their disposal" (ECC 3.9.13, 2699). Professionals may even be coercive with families, as (unintentionally?) a MSP previously working in an education authority said, "... we need to rethink how we engage the people whom the plans are supposed to be assisting and how we get them to buy into the process" (Neil Findlay, ECC 3.9.13, 2699). This comment emphasises professional power, with service users being persuaded to "buy into" the process. This is questioned by Margaret Mitchell MSP who notes the rhetoric of "putting children at the heart of the process" but the limited requirements to consult with children and young people in GIRFEC (Local Government and Regeneration Committee 4.9.13, 2524). It may be that GIRFEC and SHANARRI indicators are becoming more widely understood, but this seems largely across professionals and agencies rather than facilitating children's and their families' engagement.

GIRFEC aims to put "children in the centre" and the Government wants to demonstrate how it relates to the UNCRC (Scottish Government 2013b, 2015). Traces of concern about children's or parents' rights being adequately considered in regards to GIRFEC can be found in early parliamentary discussions: for example, whether a child or parent could ask for an alternative 'Named Person' or what recourse a child or parent would have if their child's plan were unsatisfactory or not implemented. But as parliamentary scrutiny went on, rights arguments generally disappeared except in two areas.

One was the heated debate about the 'Named Person' role. The concern was not about children's rights but that parents' rights would be infringed. For some MSPs and a vociferous external coalition, the Named Person was seen as unduly intrusive, holding and perhaps

sharing information with other services without parents' control. The Government held firm on this provision. The Government sought to explain that the Named Person was primarily an information point and would be little used unless some concerns arose for the child. The provision has been judicially reviewed but may yet be appealed¹.

Two, the confluence of children's rights, parents' rights and the role of the state came together over debates over the information sharing provisions. These provisions were initially criticised for being overly wide. As outlined at first in S.26, a service provider or relevant authority must provide information to an 'information holder' "if it might be relevant to the exercise of any function of the service provider or relevant authority which affects or may affect the wellbeing of the child or young person ..." (S.26(4)(a)).

Considerable concerns were raised about children's right to confidentiality. The Information Commissioner UK and the Scottish Information Commissioner weighed in, stating that this and related provisions were unduly permissive in relation to data protection. A higher threshold was thus included in the Bill, so that: "a person holding information likely to be relevant to the Named Person's functions must consider what is appropriate and proportionate to share" (Scottish Government 2015, 23) and the likely benefit to a child's wellbeing must outweigh any likely adverse effect on the child's wellbeing (S.26(7)).

Government amendments were also accepted so that the information holder should ascertain and have regard to the child or young person's views, so far as is reasonable practicable, taking account of a child's age and maturity (S.26(5) and (6)). But the Government held firm, and other parliamentarians agreed, that there can be circumstances

¹ See www.scotcourts.gov.uk/search-judgments/judgment?id=1dad2a6-8980-69d2-b500-ff0000d74aa7

where children's wish for confidentiality could legitimately be breached. Concerns about children's wellbeing would trump such rights.

Over time, parliamentary debates show increasing references to wellbeing and decreasing references to rights. For example, the Minister for Children and Young People ends her overview of the Bill, in the last parliamentary stage, with words on wellbeing:

"Beyond the individual elements of the bill, perhaps its most important achievement lies in its title: it is a bill for the children and young people of Scotland. Over the past year, Parliament has given the whole wellbeing of children and young people its full intense consideration." (SP 19.2.14, 27918)

This contrasts to how she introduced the legislation, as quoted above. Children's wellbeing is seen as framing the legislation – and not children's rights.

Concluding discussion

The particular history of the Children and Young People (Scotland) Act 2014 sets up a tension between children's rights and children's wellbeing. This might have been avoided if the original plan to have a children's rights bill had gone through. But the legal professional raised significant concerns about the technicalities of what was proposed and the Scottish Government decided to put forward a combined bill. The Scottish Government could have chosen, still, to frame the bill by children's rights. After all, there had been a growing propensity for Scottish legislation to have overarching principles – started slowly in the Children (Scotland) Act 1995 (see Tisdall 1997) and accepted in legislation like the Mental Health (Care and Treatment) (Scotland) Act 2003. These could have applied across the 2014

legislation, demonstrating that children's rights was the organising framework. Instead, the 2014 legislation places the frameworks side-by-side, with no articulation between them: Part 1 addresses children's rights, placing vague and weak duties on Scottish Ministers and toothless reporting duties on public authorities; Part 3 places strong duties on key public commissioners for children's services – local authorities and health boards – in regards to service planning and implementation for children's wellbeing. This is further supported by an infrastructure for individual children's assessments and plans and the co-ordination provided by the Named Person. Children's wellbeing thus had a strong infrastructure as well as legal standing.

The debates and amendments during the passage of the Bill only underline the dominance of children's wellbeing. Members of the Parliament and Government were typically unpersuaded by arguments to strengthen children's rights in Part 1 and across the legislation more generally. Children's wellbeing, by contrast, was commended for its holistic perspective, its familiarity to agencies and professionals, and its contribution to early intervention and prevention. The Bill was increasingly described in terms of wellbeing, welfare and needs of children and young people – and the rhetoric of “making rights real” all but disappeared by the final stages of the Bill. While efforts are being made to include children's rights concepts within further work on the SHANARRI indicators, children's rights are increasingly seen as contributing to children's wellbeing, rather than children's wellbeing contributing to children's rights.

The advantages of children's wellbeing as a concept, methodologically and politically, can be traced through the parliamentary debates. Children's wellbeing has at least two persuasive sources (Morrow & Mayall 2009): the public health perspective that health is not solely the

lack of disease or infirmity but also a “state of complete physical, mental and social well-being” (World Health Organisation 1946); and the quantitative development of cross-national indicators, such as developed through the UNICEF Report Cards². As a result, children’s wellbeing conceptually has several advantages: it is maximising, it can incorporate positive outcomes and it can consider what assists children’s wellbeing as well as what hinders it. Children’s wellbeing is a flexible concept, as it has no fixed definition, so it can be developed and adapted, debated and collectively agreed (see Camfield et al. 2009). It thus can incorporate familiar indicators, like educational achievements and health outcomes, as well as children’s own concerns (Ben-Arieh 2005) such as relationships of love and friendship (Statham & Chase 2010). A host of academics and other researchers have invested considerable energy into measuring children’s wellbeing, bringing their statistical expertise in increasing sophistication to develop domains and indicators (see for example Ben-Arieh et al. 2014; Bradshaw et al. 2007; Bradshaw 2014). This suits the current political emphasis on outcomes, to hold services accountable and forward policy objectives. It fits well with the recognition of early intervention and prevention rather than secondary and tertiary services and crisis intervention, both in terms of service costs and the experiences of children and their families (Christie Commission 2011). Further, the parliamentary discussions demonstrate that children’s wellbeing continues a trajectory: it is the improvement on the previous needs-based approach. The possibility of state support is extended by a lower threshold for state intervention than a child’s welfare and a wider recognition of children’s needs. Children’s wellbeing will enlist services and professionals

² See for example <http://www.unicef.org.uk/Latest/Publications/Report-Card-11-Child-well-being-in-rich-countries/>

together on a common agenda, which will address the problems of service fragmentation and lack of professional co-ordination. Children's wellbeing thus is conceptually, methodologically and politically attractive as a policy and practice framework.

In contrast, children's rights, and particularly the UNCRC, were not valued as positively as a policy and practice framework. In parliamentary discussions, the UNCRC was often depicted as externally imposed as international law and not able to respect and value the Scottish legal tradition (a familiar argument globally: see Harris-Short 2003, Wells 2015). Maximising children's wellbeing was preferred over the minimum standards set out by the UNCRC (albeit the UNCRC does have maximising elements, such as Article 4). The power of children's rights to hold duty bearers – for example the State – accountable was not seen as advantageous (see Lundy 2014). Litigation and increased court power to interpret provisions were seen as something to avoid for children, even though human rights is generally accepted as a framework in Scotland.

Under rights theory and particularly the UNCRC, rights are unalienable and indivisible (UN Committee on the Rights of the Child 2003). But the Parliamentary discussions demonstrate that rights to protection and safety, safeguarding the more vulnerable children, weigh more heavily than children's right to play. Children's rights respect children as rights holders, just as their parents and other adults are also right holders. This creates a different relationship with children, parents and services than a traditional needs-based approach (Melton 2014). GIRFEC, at the very least, seeks to be informed by the UNCRC and seeks to place "the child in the centre" of all it does. But the collaborative potential of GIRFEC is not always evident, as it can emphasise professional information sharing, assessment and decisions rather than a partnership between children, their families and professionals (see Davis 2011). It risks

being apolitical, with technical resolutions rather than political debates (Tisdall & Davis 2015). In contrast, children's rights can borrow on the heritage of rights as "political trumps" (Dworkin 1977, xi), as something inalienable and absolute, as important "moral coinage" (Freeman 1983, 2). The change of status afforded by recognising children's human rights, as offered by the children's rights framework, were in practice largely seen as disadvantages rather than advantages in the parliamentary discussions on the legislation.

Further strengthening children's rights, within the legislation, was blocked in at least two ways. First, children's rights have power as legal, and not only moral, rights. When key legal professionals and organisations questioned the proposed provisions in the Bill, these questions were taken very seriously by Government civil servants, Ministers and other MSPs. Legal knowledge was given considerable esteem, although disagreements between legal professions were left unaddressed and certain politicians referred to legal views repeatedly as confusing. On a practical level, those who want to promote children's rights in Scotland would best have authoritative legal expertise on their side and preferably the leading legal professional organisations – as they have organised in the past (see Tisdall 1997). Second, children's rights were undermined because they did not have evidence of impact on children's lives. The anecdotal examples were unpersuasive to the parliamentary discussions, implying that some systematic research evidence was required. For those who want to forward children's rights, a research agenda evidencing the impact of children's rights would be politically persuasive in an outcomes-focused policy context. Such an agenda can be unpalatable to some, who assert the moral claims to children's rights irrespective of their impact. But in a situation where 'what measures matters', the lack of empirical evidence can be held against children's rights as a policy and practice framework.

The success of providing such empirical evidence, particularly economic and quantitative, can be seen in other policy areas, such as early years' education and care (see Monaghan 2012; Farrell et al. 2015). Empirical evidence fits well with broader policy trends, such as encouragement of evidence-based policy (see Pawson 2006), public health agendas (Reading et al. 2009; Young 2015), and cross-national comparisons (Tag 2012; Grek 2013). Children's wellbeing fits well with all three, while children's rights risks being side-lined as a normative framework or contributing tools (see Bradshaw et al. 2007; Doek 2014).

As the ensuing secondary legislation and guidance is developed, the children's wellbeing indicators refined, and the Children and Young People (Scotland) 2014 subsequently implemented, we will be able to see how the frameworks of children's rights and children's wellbeing separately and mutually develop. What this article currently sees as tensions and problems may be resolved productively, capitalising on the strengths of both frameworks. But with the apparent dominance of the children's wellbeing framework, we may need to use the "soft power" of promoting awareness and understanding of children's rights to forward children's rights as a policy and practice framework. Embedding children's rights within the wellbeing indicators and assessments may give it the structural support GIRFEC already gives children's wellbeing. But rather than a leap forward in children's rights, the Children and Young People (Scotland) Act 2014 seems yet another incremental step to moving the rhetorical support for children's rights into "lived rights" for children (Hanson & Nieuwenhuys 2012). "Making rights real" is a noble aspiration for Scotland, which lacks legal strength but may have increased policy and professional commitment.

The Scottish experience suggests lessons for elsewhere: to address the arguments about local applicability, litigation fears and the incorporation of social and economic rights, to

develop an evidence-based on the impact of children's rights on children's lives, and to marshal persuasive legal support. And the policy and parliamentary analysis undertaken here suggests that casually twinning children's rights and children's wellbeing together is no longer helpful; given their practical and policy relevance, their relationships need to be determined conceptually, methodologically and practically.

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